FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 4 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 962, 963, 980.

(OCTOBER TERM, 1940.)

MARTIN M. GOLDMAN, JACOB P. SHULMAN and THEODORE GOLDMAN,

Petitioners,

against

UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONERS.

JEREMIAH T. MAHONEY,
Attorney for Petitioner,
Jacob P. Shulman.

JACOB W. FRIEDMAN,
Attorney for Petitioners,
Theodore Goldman and
Martin M. Goldman.

OSMOND K. FRAENKEL,
JACOB W. FRIEDMAN,
of Counsel.

MARK SERVICE, BARCLAY 7-2180

INDEX.

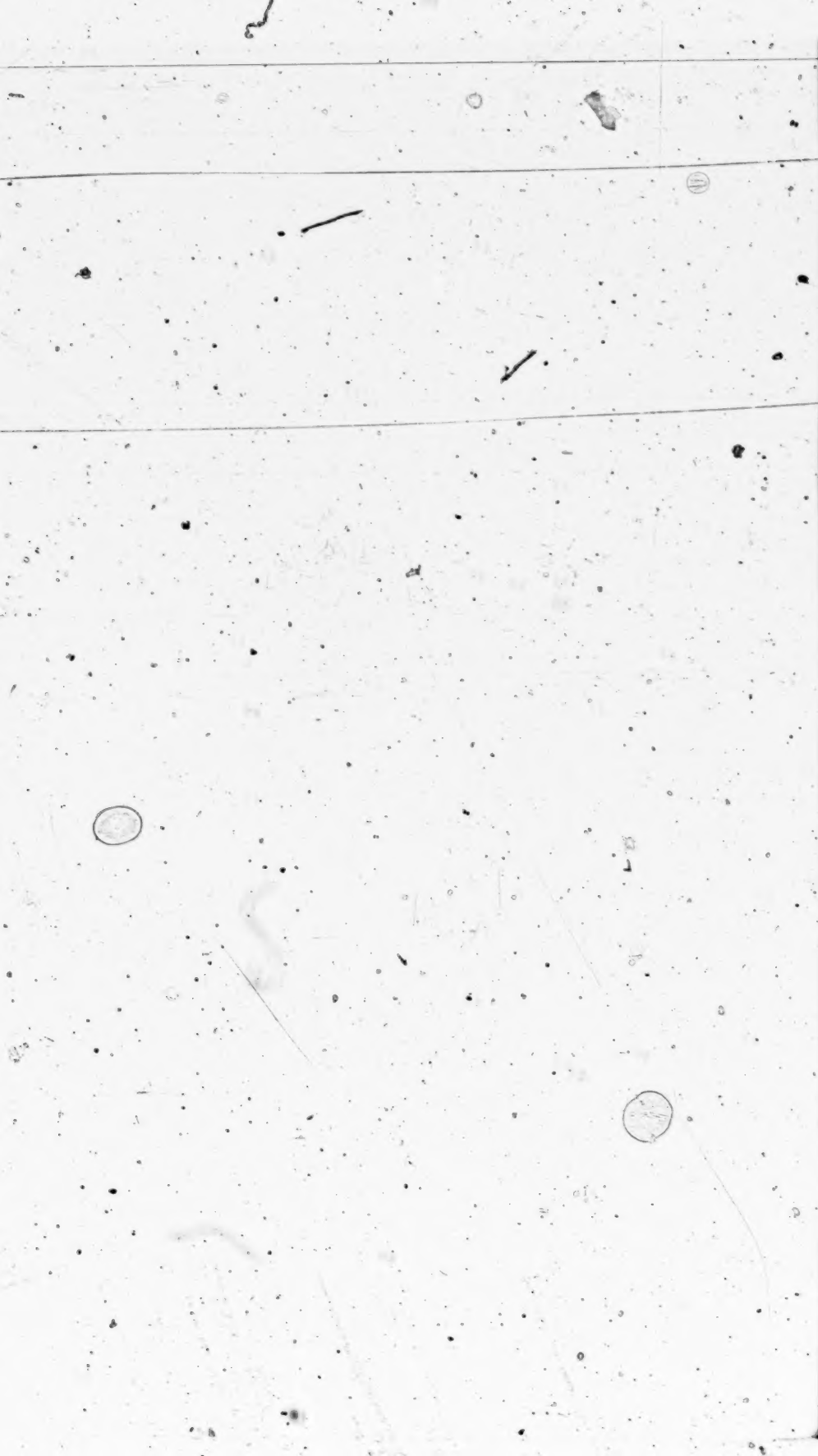
	PAGE
Reply Brief	1
Appendix	11

Cases.

Agnello v. United States, 269 U. S. 20	7
Carroll v. United States, 267 U. S. 132	4, 6
Hester v. United States, 265 U. S. 57	7
Olmstead v. United States, 277 U. S. 458	2, 4
Sorrels v. United States, 287 U. S. 435	3
Weiss v. United States, 308 U. S. 321	8

Authorities.

N. Y. Const. Art, §12	4
70 Corpus Juris 435	9
Jones, Evidence	9



IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 962, 963, 980.

(OCTOBER TERM, 1940.)

MARTIN M. GOLDMAN, JACOB P. SHULMAN and THEODORE GOLDMAN,
Petitioners,
against
UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF PETITIONERS.

The Government observes (p. 5) that petitioners do not challenge the sufficiency of the evidence supporting the conviction. This is hardly a fair statement. Petitioners have consistently asserted their innocence and will continue to do so in whatever forum such contention may be available. The Government itself recognizes (brief in opposition to certiorari) with respect to Martin Goldman that "the portions of his conversations overheard contained nothing incriminating" while "Theodore Goldman did not participate in any of the conversations overheard" (p. 10). Had this Court jurisdiction to review the weight of evidence, we are confident we could demonstrate the factual injustice of the conviction. Even the Circuit Court of Appeals (R. 1094) could say no more than that it was "for the

jury to decide whether the appellants had acted in good faith". As for Hoffman's testimony, that Court noted, "we must now take it for granted that it was believed by the jury." The irresponsive answers of that vindicative witness (R. 291), consisting of rankest hearsay, constitute the sole foundation for the reference to other alleged complaints against these defendants, and yet the Government's brief alludes to these matters (p. 7) in its narrative of the proceedings. The case is therefore not one of guilty defendants who invoke a constitutional shield, but rather a situation wherein individuals unjustly accused seek a hearing in accordance with law.

We shall now concern ourselves with the principal question of this case: the application of the Fourth Amendment.

1. The Government argues (p. 24) that petitioners' contention cannot be accepted without overruling the *Olmstead* case, 277 U. S. 438, since that case held that the Fourth Amendment did not apply unless there was the seizure of a tangible object. We do not believe that it is necessary to overrule the *Olmstead* case in order to support the position of petitioners. While it is true that the opinion of Chief Justice Taft discussed the meaning of "seizure", the decision can be supported without reference to that discussion. For, as noted in our main brief (p. 17), the decision also rested on the fact that telephone wires are projected beyond the area which is the subject of constitutional protection.

2. But, if this distinction of the *Olmstead* case be not acceptable, we submit that a reconsideration of the basic principles involved should lead to a rejection of that decision. The applicable arguments were so fully stated in the dissenting opinions of Justices Brandeis and Butler in that

case that repetition here would have little value. Nor does the brief of the Government in the case at bar add many considerations requiring extended discussion. It is true, as the Government states (p. 24), that the Fourth Amendment was formulated because of experience with certain kinds of governmental activities and that wiretapping and detectaphones are not within the literal scope of the prohibition contained in the Amendment. But there can be no doubt that they are within the effective purpose of the Amendment.

The Government (p. 33) challenges petitioners to find a logical, as distinct from an emotional, basis for differentiation between the use of the detectaphone and the use of feigned accomplices. We believe that we have already done so in our main brief, where we pointed out (p. 18) that the constitutional protection does not extend to situations in which the citizen has not safeguarded his own privacy. If one person holds indiscreet conversations with another he runs the risk of that other turning out to be a spy or informer and cannot complain of the violation of his constitutional rights. So with the person hidden in a closet, or under a table (see brief p. 32); that one does not ordinarily look for persons so hidden is not the point—with reasonable diligence one can. But no ordinary diligence will discover a secreted dictograph or detectaphone installed in an adjoining room or office.

In this connection it is important to bear in mind that while the extent of the constitutional protection is ordinarily tested in criminal cases the protection exists for all citizens—to safeguard them against oppression and possible blackmail. If the Constitution is weakened on the basis of a supposed "war against criminals" (*Sorrels* v. *United States*, 287 U. S. 435, 453, quoted by Government p. 32), it will lose its force for the people as a whole. No such consequence is necessary to permit prose-

cution for crime. For, as the Government itself recognizes (p. 42), the Fourth Amendment does not bar all invasions of privacy, but only those deemed "unreasonable."

And, since only "unreasonable" invasions are prohibited, the Congress retains power to prescribe the conditions under which reasonable wiretapping might be permitted, or the use of a detectaphone also. Congress might well adopt the New York provision (Const. Art. 1, §12) under which wiretapping may be authorized by a judge, on a showing of probable cause. There can be little doubt that, by analogy to the search warrant, this Court would hold such act to be reasonable. It might even, following the reasoning of the *Carroll* case, 267 U. S. 132, uphold wiretapping without a court order where the exigencies of the particular case prevented previous application to judicial authority. There is no basis, therefore, for the argument (p. 42) that a rejection of the *Olmstead* case by this Court would leave the Congress entirely powerless to authorize wiretapping or the use of detectaphones in cases involving espionage or sabotage.

Moreover, the apprehension voiced that the practices here debated are justifiable on the ground that the very security of the nation may be undermined by undetected acts of espionage and sabotage would appear to be illusory. While detectaphones have not yet been the subject of extensive judicial examination, a persuasive analogy is afforded by the cognate practice of wiretapping. We have submitted in an Appendix a survey, believed to be exhaustive, of all reported cases in the Federal courts in the past twenty-five years involving wiretapping. This shows not a single case of espionage or sabotage.

Moreover, the Congress has shown no concern on this subject since it has repeatedly refused to accede to requests of the Department of Justice that wiretapping be

authorized in certain classes of cases.* Since the subject of Congressional interest in this subject has been so fully covered in the brief of Representative Eliot, there is no need of our elaborating this phase of the subject further.

The Government (p. 42) suggests that a decision in favor of petitioners would prevent a military officer from intercepting a radio communication between a suspected spy and the enemy. But that simply is not so. In the first place there is a vast difference between communications by radio, which are of necessity under Government license and control, and communications between persons in the privacy of their homes or offices. Moreover, to the extent that radio interception is not now entirely forbidden by the Communications Act, interception might be justified where probable cause could be shown and the circumstances of the particular situation required immediate action.** Where, however, the time element did not make such action imperative, interception should certainly not be permitted to the civil authorities without Congressional action providing for judicial supervision, as already indicated. And there is no reason to suppose that the decision of the Court in this criminal case will determine military actions.

Thus, to uphold the position of petitioners will not cripple the Government in its fight against crime, but will ensure that in the carrying out of that struggle the agencies of Government will not have unrestricted latitude. Within well established bounds, officers of the law can pursue the criminal even if his privacy be thus invaded,

---

* In addition to the reference on page 21 of our original brief, we call the Court's attention to S. 3756, 75th Congress, 3rd Session 1938; H. J. Resolution 571, 76th Congress, 3rd Session 1940.

** Moreover, cable or radio messages sent through ordinary channels are available under Grand Jury or other subpoena (See §605 of Communications Act).

but even the suspected criminal should be protected from uncontrolled police espionage. We come then to the question, was the action of the Government agents in the case at bar "reasonable" and thus entirely outside the scope of the Fourth Amendment?

3. The Government bases its argument for reasonableness (p. 43) primarily on the circumstance that the invasion of privacy was based on probable cause and that, in the main, the matter overheard, could be described as consisting of the instrumentalities of crime. But these elements alone are not enough. This is well settled in the law of search and seizure, to which we must look for definitions of reasonableness. True, without probable cause, no search is ever valid, and (except perhaps in the case of a seizure at the time of arrest) only the instrumentalities of crime, not the mere evidence of it, may be taken. But these are elements as applicable to search with a warrant (where the question of reasonableness really has no application) as to a search without a warrant, which is the situation with which we are here concerned.

For, *prima facie* at least, all searches without warrant are unreasonable. The existence of the two chief exceptions to that rule (search upon arrest and search of a moving vehicle) make this clear. In upholding a search of a moving automobile (*Carroll* v. *United States*, *supra*), this Court indicated that the failure to obtain a warrant can be excused only by the urgent necessities of the situation. Probable cause must, of course, exist alike when the search is made without, as with, a warrant. But that this alone is not enough was stated by Chief Justice Taft in the *Carroll* case, at page 156:

> "In cases where the securing of a warrant is reasonably practical, it must be used."

That this is the real basis of the application of the rule of reasonableness is evident from *Agnello* v. *United States*, 269 U. S. 20. There a search without warrant was held unconstitutional, though based on probable cause, because the circumstances permitted an application for a warrant. Mr. Justice Butler expressly pointed out, citing many cases, that search without warrant of a dwelling house has always been held unlawful "notwithstanding facts unquestionably showing probable cause" (p. 33). The Government cites (p. 28) the *Hester* case, 265 U. S. 57, as though it were authority for upholding a search without warrant merely because there was probable cause. That is not a correct understanding of that case, which rested not at all on the existence of probable cause, but solely on the fact that the premises "searched", being open fields, were not covered by the Fourth Amendment at all.

In the case at bar it is clear that no urgency for immediate action existed which would have authorized action without judicial approval had an orthodox search been the object of the agents' activities.

Nor can it be argued (as is attempted by the Government p. 44) that these considerations cannot apply here because the Congress has set up no machinery for obtaining warrants or analogous orders for the use of detectaphones. The scope of a constitutional protection surely cannot be narrower because of Congressional inaction than it would be if the Congress had acted. The Congress can add to the protection of the individual by imposing restrictions on Government agents beyond those contained in the Constitution; it cannot limit such protection either by action or inaction. The only proper consequence, therefore, of Congressional inaction must be that the use of a detectaphone is barred, except perhaps in those exceptional circumstances in which prior judicial sanction has never been thought necessary even in the

case of searches. Clearly such would be the case with regard to a conventional search had Congress never authorized search warrants; the same result must follow with regard to detectaphones. That Congressional inaction may have been inadvertent rather than deliberate is of no consequence. For the future Congress can correct any lack if it so desires, but past action cannot be given validity merely because had machinery existed valid action might have been taken. Especially must this be so, since the books are full of instances in which Government agents have disregarded the statutory provisions dealing with search warrants and have acted without the prior sanction which alone could validate their acts.

It is submitted, therefore, that there is no basis for holding the action of the Government agents reasonable within any definition heretofore given that term in search and seizure cases.

---

4. Finally, it is suggested by the Government (p. 50) that whatever may be the case with regard to petitioner Shulman, the situation of the Goldmans is different because the invasion of privacy did not affect them. Passing the point that petitioner Martin Goldman was directly affected because his conversations were overheard, we challenge the basis on which the Government's contention rests. We believe that this Court's decision in the *Weiss* case, 308 U. S. 321, requires the conclusion that where evidence has been illegally received against one of several defendants in a conspiracy case the ends of justice require a new trial for all the defendants so that their guilt may be determined without the improper evidence being before the jury at all.

The fundamental questions involved in this phase of the case have been extensively argued in the case of

Goldstein v. *United States*, No. 256 of this Term, in the brief of petitioner Schwarz at pp. 11-13. We respectfully refer to that discussion and incorporate it herein.

In considering the consequences of an adjudication that the use of a detectaphone is constitutionally permissible, the Court may appropriately examine the effect of such decision upon that whole group of communications which both common law and statute have traditionally classed as privileged. The characteristic and most litigated one is that obtaining between attorney and client, although the applicable principles do not differ in the cases of confidential transactions with spiritual advisers, physicians, spouses or Government officials (*inter se*). Should the decision under consideration be upheld, any one might secretly affix a detectaphone to the exterior wall of a home or office (including an attorney's office), make a record of a supposedly confidential conversation and testify freely to whatever was thus learned. The power to disclose springs from the basic rule that an individual covertly overhearing a conversation between an attorney and client is permitted to testify as to its contents. This is the established law in every jurisdiction where the question has arisen (70 Corpus Juris 435; Jones on Evidence, 3d Ed., p. 1156). The holding now *sub judice* approves the use of a relatively new scientific device which will give outsiders a further effective means of ascertaining those communications whose confidential character it has generally been deemed so important to preserve—merely because of the ancillary rule that declines to cloak with the privilege the fruits of surreptitious cognizance.

Conclusion.

We respectively submit that the convictions should be reversed.

Respectfully submitted,

JEREMIAH T. MAHONEY,
Attorney for Petitioner,
Jacob P. Shulman.

JACOB W. FRIEDMAN,
Attorney for Petitioners,
Theodore Goldman and
Martin M. Goldman.

OSMOND K. FRAENKEL,
JACOB W. FRIEDMAN,
of Counsel.

APPENDIX.

TABULATION OF WIRETAPPING CASES:

United States v. *Bruno*, 308 U. S. 287 (1939) (violation of narcotics law);

United States v. *Bernard*, 95 F. (2d) 310 (C. C. A. 2d, 1938 (transportation of stolen treasury notes);

Bonanzi v. *United States*, 94 F. (2d) 570 (C. C. A. 2d, 1938 (violation of narcotics law);

United States v. *Bushouse*, 67 F. (2d) 843 (C. C. A. 6th, 1933) (violation of liquor laws);

United States v. *Fallon*, 112 F. (2d) 894 (C. C. A. 2d, 1940) (violation of narcotics law, bribing of public official, and obstructing justice);

Foley v. *United States*, 64 F. (2d) 1 (C. C. A. 5th, 1933) (violation of National Prohibition Act);

United States v. *Ginsberg*, 96 F. (2d) 433 (C. C. A. 5th, 1938) (violation of narcotics law);

Green v. *United States*, 19 F. (2d) 850 (C. C. A. 9th, 1927) (violation of National Prohibition Act);

United States v. *Gruber*, 39 F. Supp. 291 (S. D. N. Y., 1941) (criminal prosecution for "tapping" Securities and Exchange Commission wires);

United States v. *Jenello*, 102 F. (2d) 587 (C. C. A. 3d, 1939) (violation of tax law in respect to liquor);

Kerns v. *United States*, 50 F. (2d) 602 (C. C. A. 6th, 1931) (violation of National Prohibition Act);

United States v. *Klee*, 101 F. (2d) 191 (C. C. A. 3d, 1938) (violation of Internal Revenue Law in respect to liquor);

Morton v. *United States*, 60 F. (2d) 696 (C. C. A. 7th, 1932) (violation of Volstead Act)

Nardone v. *United States*, 302 U. S. 379 (1937) and 308 U. S. 338 (1939) (violation of Internal Revenue Law pertaining to liquor);

Olmstead v. *United States*, 277 U. S. 438 (1928) (violation of National Prohibition Act);

United States v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2d, 1940) (violation of narcotics law, bribing an official, and obstructing justice);

United States v. *Pillon*, 36 F. Supp. 567 (E. D. N. Y., 1941) (violation of conspiracy law);

United States v. *Plisco*, 22 F. Supp. 242 (D., D. C., 1938) (violation of gambling laws);

United States v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d, 1938) (violation of White Slave Traffic Act);

Sablowsky v. *United States*, 101 F. (2d) 183 (C. C. A. 3d, 1938) (violation of Internal Revenue Laws pertaining to liquor);

United States v. *Seeman*, 115 F. (2d) 371 (C. C. A. 2d, 1941) (transportation of stolen treasury notes);

Smith v. *United States*, 91 F. (2d) 556 (App. D. C., 1937) (violation of Internal Revenue Laws pertaining to liquor);

Valli v. *United States*, 94 F. (2d) 687 (C. C. A. 1st, 1938) (violation of Internal Revenue Law pertaining to liquor);

Wallace v. *United States*, 291 Fed. 972 (C. C. A. 6th, 1923) (bribery of public official);

Weiss v. *United States*, 308 U. S. 321 (1939) (use of the mails to defraud);

United States v. *Ying Ping Jong*, 26 F. Supp. 69 (D. C. Pa., 1939) (violation of narcotics law).